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No. 04-190

IN THE

Supreme Court of the United States

PETRO-HUNT, L.L.C., *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at page *iii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Petitioners, Petro-Hunt, L.L.C., Hunt Petroleum Corporation and Kingfisher Resources, Inc. (hereinafter "petitioners"), reply to the Brief of the United States in Opposition as follows.

This case is about *res judicata*. It is not about the relative merits of the result obtained in *United States v. Nebo Oil Company*, 90 F. Supp. 73 (W.D. La. 1950), *aff'd*, 190 F.2d 1003 (5th Cir. 1951), *vis a vis* the later decision of this court in *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973), and the Fifth Circuit's decision in *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001), *cert. denied*, 537 U.S. 822 (2002). These later cases are inapposite to a determination of the scope and breadth, and finality, of the *Nebo* judgment.

The government apparently wants to "retry" *Nebo* using these later decisions as precedent, and makes a considerable effort to draw attention away from the core issues of this case. For example, the fact that there are 96 servitudes does not have anything to do with application of La. Act. 315 of 1940, and the *Nebo* decision. The 96 servitudes, and any facts relating to drilling on those servitudes, are only pertinent to the issue of prescription of non-use, in the absence of Act 315, and were the subject of petitioners' alternative summary judgment motion. The alternative motion was held moot by the District Court, as a result of the court's ruling on petitioners' motion based on *res judicata*.

Court rules do not allow enough space for petitioners to respond to each allegation made by the government.[1] Instead,

1. For example, the government alleges that petitioners have supplied no proof of ownership to all of the Good Pine Minerals. (Br. in Opp. 13) The chain of title evidence is in the record (R. Doc. 85), and the District Court found that the "United States [did] not dispute that the current plaintiffs . . . are successors in interest to the mineral servitudes that had been previously owned by Good Pine Oil and later Nebo Oil Company." (Pet. App. 70a-71a)

petitioners will endeavor to discuss, and debunk, some of the government's more aggressive, but untenable, arguments.

In *United States v. Nebo Oil Co.*, *supra*, the court found that the government had represented to Nebo's predecessor in title that the minerals would not be subject to the prescriptive rules if the government bought the surface. Louisiana Act 315 of 1940 merely codified the representations made by the government in inducing the petitioners' predecessors in interest to sell their property; representations, which, in fact, enabled Louisiana landowners to be on equal footing with landowners in the rest of the country. The government also wishes to ignore the finding by the *Nebo* court that the government had adopted a policy of not buying minerals for Weeks Act purposes, had no intent to buy the minerals, and further, did not pay for the minerals. *Nebo*, 90 F. Supp. 87.

The government further asserts that petitioners are not entitled to rely on the government's 1935 title opinion, which stated that the minerals would not prescribe if the surface was sold to the government because that opinion was given to Bodcaw Lumber rather than Good Pine. (Br. in Opp. 14 n.3) The owners of Bodcaw and Grant were owners of an interest in Good Pine. Having placed their mineral holdings in Good Pine, Grant and Bodcaw wanted assurance that the minerals would not prescribe if the surface was sold to the government. *Nebo*, 90 F. Supp. at 79. Moreover, *Nebo* reflects that the notion the minerals would not prescribe, if the surface was sold to the government, had received broad support among the National Forest Reservation Commission members and its attorneys, and very likely predated 1935.[2]

2. "Mr. Florence stated that the question [of prescription] came up about 1935 or perhaps a year or so earlier when national forest purchases *first began in Louisiana*." *Nebo*, 90 F. Supp. 91 (emphasis added.) Grant and Bodcaw first sold surface acreage to the government in 1932. Further, more than 400 oil and gas wells have been drilled on this 180,000 acres, many of which were drilled before 1950.

The District Court in this case concluded that *Nebo* applied to the 24,943.93 acre conveyance from Bodcaw to the United States of which the disputed 800 acres was a part. Although the government concedes that there are "factual similarities among the various servitudes and land acquisitions," (Br. in Opp. 9) the double-speak that the government engages in to dismiss these obvious similarities defies reason. The government fails to show any reason why the 800 acres were not part of the same transaction or series of transactions as the larger conveyance which contained this acreage. Further, the government provides no rational explanation for why factual similarities are "potentially relevant for purposes of collateral estoppel, [but] are not relevant to *res judicata*." (Br. in Opp. 9)

In response to petitioners' assertion that the Fifth Circuit has restricted the scope of *res judicata*, the government contends that the petitioners wish to broaden the rules of *res judicata*. (Br. in Opp. 19) In fact, petitioners merely assert *res judicata* should apply to this case because this case arises out of the same nucleus of operative facts as *Nebo Oil*. The mineral property at issue here is comprised of six identical conveyances, made by the same group of grantors to the same grantee for a common purpose within a relatively short period of time. Where, as here, each conveyance is virtually the same and clearly part of a series of connected transactions, entered into by the same parties, each transaction a continuation of the previous transactions; then all of the transactions are based upon the same nucleus of operative facts. *See, e.g.* Restatement (Second) of Judgments § 24 cmt. (b) (1982). The District Court found, based upon undisputed facts, that the acreage that is the subject of this lawsuit was all "similarly situated." (Pet. App. 87a)

The government also alleges that it could not have asserted its additional claims to the rest of the mineral property at the time of the original *Nebo Oil* suit, because of

drilling or production on the property. However, as found by the District Court, "[t]here was no reason for the United States to wait ten years to litigate title to property whose owners claimed it would never prescribe." (Pet. App. 74a-75a)

Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001), cited by the government, speaks to the effect state courts must give to federal court judgments and is inapposite. In any event, it is clear that the federal law of *res judicata* applies to a federal court judgment. *See, e.g., Jackson v. FIE Corp.*, 302 F. 3d 515, 529 n.58 (5th Cir. 2002).

Although the Louisiana law of *res judicata* is entirely irrelevant to these proceedings, the government discusses it anyway, as apparent *lagniappe*. The government cites several old Louisiana cases in support of its claim that the *res judicata* rule imposed here should be more restrictive then the federal *res judicata* rule, including *State v. American Sugar Refin. Co.*, 32 So. 965 (La. 1902). Even if the Louisiana law of *res judicata* were to apply (which it does not), *res judicata* under Louisiana law is not now significantly different from the federal law. In Louisiana:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment.
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is

> the subject matter of the litigation are extinguished and the judgment bars a subsequent action on those causes of action.
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

La. Rev. Stat. Ann. § 13:4231 (West 2004). "[T]he new Louisiana law provides a broader application of res judicata, the purpose, now more aligned with that of federal law, being to foster judicial efficiency and to protect the final resolution of disputes by preventing needless litigation." *Louisiana Seafood Management v. Foster*, 46 F. Supp. 2d 533, 541 (E.D. La. 1999) (Citations omitted).

The government misinterprets *Moore v. Swayne-Hunter Farms, Inc.*, 841 S.W. 2d 308 (Mo. Ct. App. 1992). In *Moore*, the court found that a 1960 judgment in a condemnation proceeding condemning 10 acres of a 160 acre tract of land was binding on the parties where the ownership of the condemned portion of the land had been decided in the prior adjudication. The court specifically held:

> [T]he judgment in the . . . condemnation action adjudicated plaintiffs' interest in the land, that defendant was bound by that adjudication, and that plaintiffs were entitled to relief on their petition. This ruling makes it unnecessary to consider the respective contentions of the parties concerning the legal effect of the 1932 tax sale. . . .

Moore at 310. Plaintiff's claims to ownership of the remainder of this land were precluded by the prior adjudication in the condemnation proceeding.

The government seeks to use the "change in the law" exception to collateral estoppel, making repeated claims that it did not have an opportunity in the *Nebo* litigation to litigate the "choice of law issue." This "choice of law issue" is nothing more than the decisional law in *Little Lake*. The government could have raised any issue in *Nebo* that it raised in *Little Lake*, had it thought to do so. The government's argument that it did not get to address the "change in the law" created by this Court's decision in *Little Lake* is circular. It is axiomatic that one would never have had an opportunity to argue a later case in prior litigation. Further, there can be no doubt that choice of law was litigated in the original *Nebo* case. *See Nebo*, 90 F. Supp. 73, 85-88 (W.D. La. 1950), and Pet. 26-28. The *Nebo* decision clearly reflects a choice of law analysis. *Id.* at 83-88. The government's so-called "choice of law" issue is really the holding in *Little Lake*, and the decision in that case not to apply Act 315 of 1940.

The government's repeated diatribe that it should be allowed to relitigate title to this property because of a change in a "pure question of law" is inconsistent with the government's characterization of this case as "fact bound." The *Nebo* decision is undoubtedly a mixture of law and fact. *Nebo*'s holding that Act 315 applied, was based upon the Nebo *facts*. The government is playing with nomenclature to get a desired result. It claims that the legal issue involved here is a "pure" one, unless it better suits the government's purpose to say the case is "fact bound." The facts that apply are the undisputed facts that were found by the District Court. The District Court found that all 180,000 acres were "similarly situated." The Fifth Circuit could only reverse this conclusion by changing the facts found by the District Court. The Fifth Circuit found that the property was "separate" and described each servitude as a "distinct real right." (Pet. App. 23a) These are, quite simply, *not* the facts found by the District Court.

The government alleges that the plaintiffs will be at "an unfair advantage *vis a vis* other servitude holders on federal land for whom the rule of prescription undeniably applies." (Br. in Opp. 24) Actually, petitioners would only receive the benefit of the government's representations that prescription would not apply which has the same affect as application of La. Act 315 of 1940. Petitioners would not, as suggested by the government, be depriving any other servitude owner of any rights or benefits. This is also an argument of degree. Even the government concedes the 800 acres are not subject to prescription.

The government, citing discrete parts of comment (c) to the Restatement (Second) of Judgments § 28 (1982), further asserts that it is "hornbook law that collateral estoppel does not preclude relitigation of a legal issue when there has been an intervening change in the legal climate [e]ven when those claims are closely related." (Br. in Opp. 22) A close reading of the entirety of this comment reveals no clear application of the "change in the law" exception.

As this court has indicated, this area of the law is anything but "hornbook law." In *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984) this court stated:

> While our discussion in *Montana* [*v. United States*, 440 U.S. 147 (1979)] indicates that the exception is generally recognized, *we are frank to admit uncertainty as to its application.* The exception seems to require a determination as to whether an "issue of fact" or an "issue of law" arises in a successive case that is so unrelated to the prior case that relitigation of the issue is warranted. Yet we agree that for the purpose of determining when to apply an estoppel,

> "[w]hen the claims in two separate actions between the same parties are the same or are closely related - for example, when they involve asserted obligations arising out of the same matter - it is not ordinarily necessary to characterize an issue as one of fact or law for the purposes of issue preclusion. If the issue has been actually litigated and determined and the determination was essential to the judgment, preclusion will apply. . . . In such a case it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded as one of 'law'".

Id. at 171, quoting from *Restatement (Second) of Judgments*, § 28, cmt. (b) (1982) (emphasis added). *See also* Wright, Miller & Cooper, *Federal Practice and Procedure*: § 4425 (2002) at 659-663. ("[N]o clear rules have emerged as to the burden of supporting or defeating preclusion . . .")

The rule that the government advocates cannot be the rule where the facts are the same and the parties are the same. If it were the rule, then every judgment would be subject to reversal every time the law changed. Further, since the Fifth Circuit adopted a rule that was rejected by the Third Circuit in *O'Leary v. Liberty Mut. Ins. Co.*, 923 F. 2d 1062 (3d Cir. 1991), there is, in fact, a split in the circuits as to how the change in the law exception to collateral estoppel should apply.

The government seems to suggest that it can control the outcome of this case by invoking only part of the change in the law exception, and that only the part of that exception that it invoked should apply. It argues that, because it has

not "invoked" the specific exception based upon the change in the law described in *Stauffer* and *Burlington Northern R.R. Co. v. Hyundai Merchant Marine Co., Ltd.*, 63 F.3d 1227 (3d Cir. 1995), those cases do not apply here (Br. in Opp. 26.) This assertion by the government, that it can pick and choose which parts of the applicable rule that it wishes to apply, is absurd. One litigant cannot control his opponent's arguments by choosing, carefully, his own. The "change in the law" exception is not pertinent where, as here, the claims are identical, and the parties the same. *O'Leary, supra*, 923 F.2d 1062 at 1070.

Sullivan v. Gagnier, 225 F. 3d 161 (2d Cir. 2000), cited by the government, is inapposite. There, the court of appeals found that it could not apply collateral estoppel based upon a prior criminal conviction where "none of the records from the prior . . . proceeding . . . were before the district court." *Id.* at 166.

Lastly, the government claims that *certiorari* in this case is premature, since this decision is interlocutory. In this assertion the government is twice mistaken. First, the decision in this case appears to be final as to title based on La. Act 315 of 1940. Second, even assuming that the ruling is not final, the Fifth Circuit has, in its ruling, effectively deprived plaintiffs of a trial to litigate title to this acreage. The Fifth Circuit did not remand this case for trial, as one would expect in overturning a summary judgment motion. Instead, it remanded the case "so that the district court can determine which servitudes have in fact prescribed." (Pet. App. 28a)

CONCLUSION

A casual reader, not familiar with this litigation, could read the District Court's decision and the Court of Appeals' decision and be surprised to learn that both courts were deciding the same case. The government's brief provides no relief from this duality. Something is clearly wrong, and this court must intervene to prevent a miscarriage of justice and continued distortion of the law of finality of judgments. It has been twenty years since the Court decided *Stauffer*. This case presents a timely opportunity to revisit that decision. This Court should grant Petitioners' request for *certiorari* to resolve the split in the circuits regarding these significant issues of *res judicata* and collateral estoppel.

Respectfully submitted,

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